Ooi Chek Chai & Anor v Low Thow Yoong Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-414 OF 1996
GOPAL SRI RAM, NH CHAN AND AHMAD FAIRUZ JJCA
24 JANUARY 2000

Land Law *— Restraint on dealings — Caveats — Application to extend period of caveats — Failure to exercise option within stipulated period — No fresh agreement concluded despite negotiations — Whether serious questions to be tried*

The appellant had in April and June 1995 lodged caveats against the respondent's land. Subsequently, he applied to have the caveats extended but the application was refused by the learned judge in the Penang High Court. Thus, the appellant appealed, claiming that the learned judge had erred in holding that there were no serious questions to be tried and that the balance of convenience lay in favour of removing the caveats.

Held, dismissing the appeal:

(1) The learned judge had applied the correct test, as laid down by the Privy Council in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212, of whether there are serious questions to be tried when refusing to extend the caveats lodged by the appellant. There are no serious questions to be tried in this case as the appellant had conceded that an option granted by the respondent was not exercised within the period stipulated. Furthermore, there was no fresh agreement concluded, as argued by the appellant, as the parties were still negotiating (see p 279A–C, G).

(2) Although it was not strictly necessary for him to do so, the learned judge was rightly exercising his discretion when he found that the balance of convenience lay in favour of the caveats being removed. The function of an appeal court being one to review only, it will not intervene where the appellant has not satisfied the court that a discretion had been wrongly exercised or that the judge had failed to take into account some relevant matters or took into account irrelevant matters (see p 279G–I).

[Bahasa Malaysia summary

Perayu telah pada April dan Jun 1995 telah memasukkan kaveat-kaveat terhadap tanah responden. Kemudian beliau memohon agar kaveat dilanjutkan tetapi pemohonan tersebut ditolak oleh hakim yang arif di Mahkamah Tinggi Pulau Pinang. Dengan itu, perayu telah merayu, mendakwa bahawa hakim yang arif telah silap di dalam memutuskan bahawa tidak terdapat persoalan-persoalan serius yang boleh dibicarakan dan bahawa imbangan kemudahan adalah berpihak kepada pengalihan kaveat tersebut.

Diputuskan, menolak rayuan tersebut: A

(1) Hakim yang arif telah memakai ujian yang betul, seperti yang diputuskan oleh Majlis Privy di dalam *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212, sama ada terdapat persoalan-persoalan serius yang boleh dibicarakan semasa enggan melanjutkan kaveat-kaveat yang dimasukkan oleh perayu. Tidak B terdapat persoalan-persoalan serius yang boleh dibicarakan di dalam kes ini kerana perayu telah bersetuju bahawa pilihan yang diberikan oleh responden tidak dijalankan di dalam tempoh yang diperuntukkan. Selanjutnya, tidak terdapat perjanjian baru yang telah disimpulkan, seperti yang dihujahkan oleh perayu, kerana pihak-pihak masih berunding (lihat ms ms 279A–C, G). C

(2) Walaupun ia bukanlah secara ketat memerlukannya untuk berbuat demikian, hakim yang arif menjalankan budi biacaranya dengan betul apabila mendapat tahu bahawa imbangan kemudahan adalah berpihak kepada kaveat tersebut dialihkan. Peranan mahkamah rayuan yang berbentuk semakan sahaja, ia D tidak akan mencelah di mana perayu belum memuaskan mahkamah bahawa budi bicara telah dijalankan dengan salah atau bahawa hakim gagal untuk mengambil kira perkara-perkara yang berkaitan atau mengambil kira perkara-perkara yang tidak berkaitan (lihat ms 279G–I).]

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Notes

For cases on application to extend period of caveats, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2674–2680.

F

Cases referred to

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)

Lau Brothers & Co v China Pacific Navigation Co Ltd [1965] 1 MLJ 1 (refd)

United Scientific Holdings Ltd v Burnley Borough Council [1978] AC 904 G (refd)

Appeal from: Civil Summons No 22–71 of 1996 (High Court, Pulau Pinang)

M Navaratnam (*Ghazi & Lim*) for the appellant. H

Karin Lim (*Presgrave & Matthews*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment of the court): This appeal is directed against the order of the learned judge in Penang refusing extension of the caveats lodged by the appellant on 1 April 1995 and 12 June 1995. The case for the appellant is that the learned judge erred in I holding that there were no serious questions to be tried and that the balance of convenience lay in favour of removing the caveats.

A The basic facts which this appeal raise are not in dispute. They have been dealt with in extenso by the judge and we are spared from repeating them here. The starting point is an option issued by the respondent to the first plaintiff in the court below. The option also expressed itself to be valid until noon 28 March 1995. The appellant readily conceded before us that the option was not exercised within the period stipulated.

B In accordance with settled principles it follows that the offer contained in the option lapsed upon its expiry (see *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904). Mr Navaratnam, however, argued that despite non-exercise of the option, the parties had nevertheless entered into fresh negotiations that culminated into an agreement. He took us C through the correspondence exchanged between the solicitors for the respective parties. We have examined the correspondence and we find ourselves in agreement with the learned judge that at the end of the day the parties were still negotiating and there was no concluded agreement between them. In our view, the present case is governed by the decision in *Lau Brothers & Co v China Pacific Navigation Co Ltd* [1965] 1 MLJ 1.

D It is sufficient to quote from the headnotes of that case:

> This was a claim for damages for breach of 'a contract for failure to take delivery of logs'. It was argued for the plaintiffs that the parties had by the exchange of five telegrams effected a binding contract. Subsequent to the exchange of these telegrams there were letters in which, inter alia, the method E of payment was discussed. Eventually the defendants wrote to the plaintiffs informing them that they considered the transaction unsuccessful. The question was whether there was a binding contract.
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> Held:
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> (1) Where a contract is to be found in letters, it is necessary to take the whole of the correspondence into consideration to ascertain whether the F parties have come to binding agreement;
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> (2) in this case the parties were still in state of negotiation and the defendants were justified in withdrawing their offer. *Hussey v Horne Payne* 4 App Cas 311 *Bristol Cardiff & Swansea Aerated Bread Co v Maggs* (1890) 44 Ch D 616; *May v Thomson* 20 Ch D 705 at p 723.

G Having found ourselves in agreement with the learned judge upon the issue whether there is a serious question to be tried, little remains in the appeal. Suffice to say the learned judge applied the correct test as laid down by the Privy Council in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212.

Although it was not strictly necessary for him to do so, after having held H there was no serious questions to be tried, the learned judge went on to hold that the balance of convenience lay in favour of the caveats being removed. In doing so, he was exercising the discretion vested in him by Parliament. The principles by which an appellate court is bound to act in such a matter as this are well settled and beyond argument. Initially our function is one of review only. We have no original discretion. It is only when the appellant I satisfies this court that a discretion has been wrongly exercised or that the judge failed to take into account some relevant matters or took into account irrelevant matters, that this court may intervene.

The present appeal is plainly not such a case. We are entirely satisfied that the learned judge exercised his discretion properly having regard to the facts before him and that this appeal must be dismissed without the necessity of calling upon the respondent. The appeal is dismissed with costs. The orders of the learned judge are affirmed. The deposit in court shall be paid out to the respondent to account of its taxed costs.

Appeal dismissed.

Reported by Joel Ng